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No. 97-215

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ARTHUR CALDERON, WARDEN, CALIFORNIA STATE PRISON AT SAN QUENTIN,

PETITIONER,

-VS-

THOMAS MARTIN THOMPSON,

RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIÆ IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIÆ

The Amici Curiæ States respectfully offer this brief in support of the Petitioner, Arthur Calderon, Warden of the California State Prison at San Quentin. The Amici States, like Petitioner, must run the gauntlet of habeas corpus appellate review in the Federal Circuit Courts of Appeals before they may enforce death sentences that their state courts have previously reviewed and found valid.[1] The Amici States have a keen interest in whether federal circuit courts of appeals may delay and defeat the States' right to enforce final convictions and sentences of death by using procedural legerdemain to reopen review of convictions and sentences that the federal courts had earlier declared final. If federal circuit courts may indulge at any time in quixotic searches for epistemological certitude in particular criminal cases, even after the court itself has declared its review completed and final, they eviscerate the States' ability to enforce their laws and destroy the comity between the federal and state governments that this Court has carefully established in its habeas corpus decisions. The Amici States have a profound interest in this Court's resolution of this case because the Ninth Circuit's decision, and any decisions from other circuit courts that choose to follow it, will disrupt the States' ability to enforce their laws against capital defendants.

SUMMARY OF ARGUMENT

The nature of habeas corpus review and the interests of comity demand that federal appeals courts never recall their mandates in habeas corpus cases to grant relief to state prisoners. Recalling mandates is inconsistent with the nature of habeas corpus review and destroys the comity between the federal and state governments. Throughout the history of habeas corpus jurisprudence, this Court has carefully preserved comity between the federal and state courts, requiring federal courts to respect the States' rights to administer and enforce criminal laws. Recalling mandates destroys that comity because it leaves review of valid and otherwise enforceable convictions and sentences perpetually open. No state conviction or sentence would ever be final. Because nothing would ever be final, recalling mandates is antithetical to our system of justice, defeating its effectiveness.

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1. This brief refers to death sentences because the case before this Court is a capital case. However, the argument in this brief applies equally to noncapital cases, because the concerns of comity and finality apply to *all* criminal convictions and sentences.

Moreover, recalling a mandate is unnecessary to prevent injustice, because state prisoners have other avenues of relief that are consistent with comity.

ARGUMENT IN SUPPORT OF PETITIONER

THE NATURE OF HABEAS CORPUS REVIEW AND THE INTEREST OF COMITY DEMAND THAT A FEDERAL APPEALS COURT NEVER RECALL ITS MANDATE TO GRANT A STATE PRISONER RELIEF IN A HABEAS CORPUS APPEAL.

Although this Court has asked whether the Ninth Circuit abused its discretion in recalling its mandate after completing its appellate review in this case, the broader issue is whether any federal appeals court may *ever* recall its mandate in a habeas corpus appeal. The answer is that the nature of habeas corpus review and the interest of comity between the federal and state governments demand that a federal appeals court *never* recall its mandate in a habeas corpus case to grant a state prisoner relief.

Recalling a mandate is inconsistent with the nature of habeas corpus review and destroys the comity between the federal and state governments. The United States Congress expanded the federal courts' habeas corpus jurisdiction in 1867 to include the claims of state prisoners that they were imprisoned in violation of their federal constitutional rights, so that former slaves would have a forum to vindicate their constitutional rights against those states reluctant to comply with the Civil War Amendments. *Hawk v. Olson*, 326 U.S. 271, 274 & n.3 (1945). This expansion necessarily brought federal courts in conflict with state courts, and this Court emphasized in its earliest cases that habeas jurisdiction should be exercised charily, to minimize interference with the States' execution of their laws:

> [Discretion to issue a writ of habeas corpus] should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the constitution.

Ex parte Royall, 117 U.S. 241, 251 (1886).

After this Court's decision in *Royall*, it repeatedly reiterated that "it is a principle controlling all habeas corpus petitions to the federal courts that

those courts will interfere with the administration of justice in the state courts only 'in rare cases where exceptional circumstances of peculiar urgency are shown to exist.'" *Ex parte Hawk*, 321 U.S. 114 117 (1944) (quoting *United States ex rel. Kennedy v. Tyler*, 269 U.S. 13, 17 (1925)); *see Frank v. Mangum*, 237 U.S. 309, 329 (1915); *Baker v. Grice*, 169 U.S. 284, 290–91 (1898) (reiterating the need for "forbearance" in exercising habeas jurisdiction to promote comity). To ensure minimum interference with state criminal cases, habeas jurisdiction was prudentially limited to instances where a state court lacked jurisdiction to imprison a person or a state failed to provide a prisoner with a "corrective process" to litigate his claims of unconstitutional imprisonment. *Frank*, 237 U.S. at 335; *In re Eckhart*, 166 U.S. 481, 483 (1897); *In re Jugiro*, 140 U.S. 291, 296–97 (1891); *In re Wood*, 140 U.S. 278, 285–87 (1891). Habeas jurisdiction did not extend to mere "errors" the state courts may have made in deciding issues. *Frank*, 237 U.S. at 336; *Markuson v. Boucher*, 175 U.S. 184, 187 (1899). Moreover, if a state prisoner could have presented his claim to the appropriate state court for resolution, but had not done so when he sought a writ of habeas corpus, a federal court could not consider the claim. *Darr v. Burford*, 339 U.S. 200, 204 (1950); *Ex parte Hawk*, 321 U.S. at 116–17.

Of course, this Court reversed its narrow view of habeas jurisdiction in *Brown v. Allen*, in which this Court assumed that a federal court acting within its habeas jurisdiction could consider claims of constitutional violations that the prisoner had already litigated in state court. 344 U.S. 443, 464–65 (1953) (Reed, J.); *Daniels v. Allen*, 344 U.S. 443, 500 (1953) (companion case; Frankfurter, J.). This Court did so without analyzing its earlier decisions abjuring such power and without mentioning comity. *Brown*, 344 U.S. at 464–65; *Daniels*, 344 U.S. at 500. Even after this startling course reversal, however, this Court remained concerned about the effect that federal courts' habeas jurisdiction had on the States' administration of their criminal laws. "Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Engle v. Isaac*, 456 U.S. 107, 128 (1982). The need to restore and respect States' rights to execute their criminal laws without undue federal interference, the comity between federal and state courts, has been at the root of major subsequent developments in habeas corpus law.

Examples abound.[2] Although the doctrine of exhaustion of state remedies as a prerequisite to habeas review predated *Brown*, the doctrine that federal court must dismiss without prejudice habeas petitions that contained exhausted and unexhausted claims, "mixed petitions," stemmed solely from a concern for comity, to allow state courts to resolve all claims of constitutional error before seeking relief in federal court. *Rose v. Lundy*, 455 U.S. 509, 514–22 (1982). The related doctrine that a state prisoner must show cause and prejudice when he procedurally defaults on a claim in state court before a federal court can consider it on habeas review is grounded in respecting state courts' procedural rules of waiver and default, and making the state court trial the "main event" in determining the validity and constitutionality of the prisoner's punishment. *Wainwright v. Sykes*, 433 U.S. 72, 88–91 (1977) (overruling *Fay v. Noia*, 372 U.S. 391 (1963), because the decision was not sufficiently deferential to comity concerns); *Francis v. Henderson*, 425 U.S. 536, 539–42 (1976); *see also Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8–9 (1992) (extending cause-and-prejudice standard to prisoner's failure to develop necessary facts in state court); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (extending cause-and-prejudice standard to failure to seek appellate review in state court).

Comity is the source of the "new rule" doctrine set forth in *Teague v. Lane*, 489 U.S. 288 (1989). Rules of constitutional law developed after a state prisoner's conviction and sentence are final, "new rules," cannot be applied to the prisoner's claims, to ensure respect for the finality of state convictions and to minimize the costs to the States of having to continually relitigate convictions and sentences:

> "[S]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands."

Teague, 489 U.S. at 308–10 (quoting *Engle*, 456 U.S. at 128 n.33); *see also Butler v. McKellar*, 494 U.S. 407, 414 (1990) ("new rule" principle validates "reasonable, good-faith interpretations of existing precedents made

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2. The Antiterrorism and Effective Death Penalty Act has changed some of the holdings of the cases in the following discussion. However, this discussion is not to present the law as it now may be, but to illustrate this Court's concern for comity in the historical development of habeas corpus law.

by state courts even though they are shown to be contrary to later decisions"); *Lockhart v. Fretwell*, 506 U.S. 364, 372–73 (1993) (*Teague* "new rule" doctrine inapplicable to decisions favoring State, because States' interests in comity and finality are not diminished by applying a favorable "new rule").

Comity also underlies the decision to have a higher standard of review on habeas review than direct appellate review for claims of insufficient evidence and harmless error. When a state prisoner claims in his habeas petition that the State presented insufficient evidence to convict him, in violation of the constitutional requirement that the State must prove guilt beyond a reasonable doubt, the standard is whether, based on the evidence contained in the record, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). This Court adopted the standard to "give full play to the responsibility" of the trier of fact to determine guilt or innocence and to "impinge" on the jury's discretion "only to the extent necessary" to guarantee the prisoner's constitutional rights. *Id.* When a habeas court examines whether a denial of a state prisoner's constitutional rights warrants granting the writ, the standard is whether "the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). This Court adopted this standard, rather than the "harmless beyond a reasonable doubt" standard of *Chapman v. California*, 386 U.S. 18, 24 (1967), to promote comity and finality of state convictions:

> Overturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under *Chapman* undermines the States' interest in finality and infringes upon their sovereignty over criminal matters. Moreover, granting habeas relief merely because there is a "'reasonable possibility'" that trial error contributed to the verdict, is at odds with the historic meaning of habeas corpus—to afford relief to those whom society has "grievously wronged."

Brecht, 507 U.S. at 637 (citations omitted).

Comity concerns even affect habeas doctrines not directly related to the integrity of state criminal procedures. This Court extended the cause-and-prejudice standard to the abuse of the writ doctrine in determining whether

a state prisoner could raise a new claim of error in a successive petition. *McCleskey v. Zant*, 499 U.S. 467, 493 (1991). The need to respect the finality of state court convictions and to minimize the costs to the federal and state court systems of repetitive inquiries into the constitutionality of a state prisoner's conviction and sentence demanded the cause-and-prejudice limitation. *McCleskey*, 499 U.S. at 490–93.

The necessity of preserving comity between the federal and state judicial systems—the federal courts' desire to respect the States' criminal law and procedure and the finality of state prisoners' convictions and sentences—has been this Court's primary concern in determining the scope of habeas corpus jurisdiction since Congress expanded jurisdiction to include state prisoners. Recalling a mandate after a federal appeals court has completed its review of the constitutional validity of a state court conviction directly contravenes this Court's concern for comity with state courts.[3]

Federal appeals courts have historically arrogated the right to recall their mandates as a part of their "inherent power" to control their judgments. *Bronson v. Schulten*, 104 U.S. 410, 415 (1881); *Sargent v. Columbia Forest Products, Inc.*, 75 F.3d 86, 89 (2d Cir. 1996); 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3938 (2d ed. 1996). However, the courts have always held that this power must be "exercised sparingly," and reserved for "exceptional circumstances." *Sargent*, 75 F.3d at 89; *Zipfel v. Haliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988). Such limits are necessary to "preserve finality in judicial proceedings." *Sargent*, 75 F.3d at 89. This Court has long noted the importance of finality of judgments:

> Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the

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3. The same concern for comity would not exist, however, if the *State* moved to recall the mandate, as the United States did on direct appeal in *United States v. Davis*, 36 F.3d 1424, 1429-30 (9th Cir. 1994). In *Davis*, the United States moved to recall the mandate in the defendant's appeal, because a recent decision of this Court contradicted the Ninth Circuit's decision on the appeal. *Id.* Recalling the mandate in such instances would not negatively affect federal-state comity, because the *State* would be seeking a recall in furtherance of its responsibility to enforce its criminal laws. *Cf. Fretwell*, 506 U.S. at 372–73 (*Teague* inapplicable when "new rule" benefits the state).

> contest, and that matters once tried shall be considered forever settled as between the parties.

Baldwin v. Iowa State Traveling Men's Association, 283 U.S. 522, 525 (1931).

Recalling a mandate destroys the finality of state convictions and sentences in much the same way as permitting successive habeas petitions. As with successive petitions, recalling a mandate "strikes at finality": "One of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known." *McCleskey*, 499 U.S. at 491. Recalling a mandate is an even more lethal blow to finality, because the mandate is the very instrument a court issues to proclaim that its review of the matter has been completed and is final.

Recalling a mandate destroys finality also because the State is deceived to its great detriment; the State believes that the conviction and sentence are once and for all final, and takes the appropriate measures to carry out the sentence, but suddenly is blocked. The State's right to enforce its laws is delayed indefinitely: "Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them." *Id.*

Recalling a mandate is antithetical to our ordered system of justice. To be effective, punishment must be swift and sure. The threat of punishment is undermined if "we so define the processes leading to just punishment that it can really never be finally imposed at all." Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 (1963). The ability to recall a mandate indeed undermines justice: "The idea of just condemnation lies at the heart of the criminal law, and we should not lightly create processes which implicitly belie its possibility." *Id.* Moreover, recalling a mandate permits judges with particular political viewpoints the opportunity to delay and emasculate judgments to advance their political beliefs:

> The problem [of the lack of finality] is most acute and most obvious in cases where the death penalty has been imposed; I would be surprised if receptivity toward endless reopening and delay of death cases were not sometimes masking underlying hostility to the use of the penalty in any case.

Id. at 453 n.23.

Generally, an appellate court recalls its mandate only when the law governing an appeal, such as a statute or decision of this Court, has changed, calling into serious question the appellate court's judgment. *Sargent*, 75 F.3d at 90; *Zipfel*, 861 F.2d at 567. Mere disagreement with one panel's resolution of legal issues, however, is not sufficient to justify recalling a mandate: "Whether we would make the same determination is irrelevant, we may not now question the first panel's reasoning." *Fine v. Bellefonte Underwriters Insurance Co. Inc.*, 758 F.2d 50, 53–54 (2d Cir. 1985). As the Second Circuit Court of Appeals noted,

> Whatever error is perceived to exist in the original panel's refusal to recall its mandate pales beside the far greater error that we would commit were we to recall its mandate. Absent a change of circumstance or law, one panel of an appellate court cannot review the decision of a previous panel.

Fine, 758 F.2d at 54.

In the case at bar, the en banc majority recalled the mandate merely because, in its phrase, "the panel appears to have made fundamental errors of law that, if not corrected, would lead to a miscarriage of justice." *Thompson v. Calderon*, 1997 WL 441835 at *2 (9th Cir. 1997). This is, however, nothing more than the en banc majority's disagreement with the panel's resolution of the claims, which is insufficient to warrant recalling the mandate. *Fine*, 758 F.2d at 53–54. The en banc majority merely "second-guessed" the panel:

> What seems so objectionable is second-guessing merely for the sake of second-guessing, in the service of the illusory notion that if we only try hard enough we will find the "truth."

Bator, *Finality in Criminal Law*, 76 HARV. L. REV. at 451. Never resolving claims disparages the very concept of criminal justice:

> A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of the underlying substantive commands. . . .

> . . . There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility.

Id. at 452–53 (footnotes omitted) (quoted with approval in *McCleskey*, 499 U.S. at 492). Recalling a mandate serves no purpose other than reopening what, after due consideration and reflection, had been closed, and should not be permitted in habeas cases.

Contrary to the finding of the en banc majority that recalling the mandate was the only way to prevent a "miscarriage of justice," recalling a mandate in a habeas case is *never* necessary to prevent injustice from occurring to a state prisoner. Before the case at bar, the *only* circumstances the Ninth Circuit ever found "exceptional," justifying the recall of a mandate, have been changes in statutes or decisions of this Court that have affected "pivotal aspects" of its decisions in particular cases. *Nevius v. Sumner*, 105 F.3d 453, 460 (9th Cir. 1996); *Malik v. Brown*, 65 F.3d 148, 149 (9th Cir. 1995); *United States v. Davis*, 36 F.3d 1424, 1429–30 (9th Cir. 1994); *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529–30 (9th Cir. 1989); *Zipfel*, 861 F.2d at 567.

The ability to recall a mandate in civil cases is necessary in exceptional cases, as in *Malik*, *Zipfel*, and *Bryant*, to prevent injustices from occurring, because civil litigants have no avenue of relief other than recalling a mandate when the controlling law has changed in their favor. *Malik*, 65 F.3d at 149; *Bryant*, 886 F.2d at 1529–30; *Zipfel*, 861 F.2d at 567. But such is not the case in habeas review. Unlike civil litigants, state prisoners cannot receive the benefit of a new decision of this Court, because "new rules" of constitutional law do not apply on habeas review. *Teague*, 489 U.S. at 308–10. Also unlike civil litigants, state prisoners have avenues available to them after the mandate has issued. If a state prisoner has discovered new evidence that shows that he was not guilty of the crime for which he was convicted, he may return to state court to present the evidence in post-conviction proceedings, or he may request clemency from the state executive. *Herrera v. Collins*, 506 U.S. 390, 416–17 (1993); Note, *Substantive Justice and State Interests in the Aftermath of* Herrera v. Collins*: Finding an Adequate Process for the Resolution of Bare Innocence Claims Through State Postconviction Remedies*, 75 TEX. L. REV. 131, 157–59 (1996). Executive clemency is available in all states that authorize capital punishment; 38 states allow unlimited claims of innocence in post-conviction proceedings, and eleven states allow claims of innocence with

certain time restrictions. *Herrera*, 506 U.S. at 414 & n.14; *Substantive Justice*, 75 TEX. L. REV. at 157–60. Moreover, a state prisoner may always file a successive petition for writ of habeas corpus if his claims meet the stringent standards for presenting such claims. 28 U.S.C. § 2244(b)(3)(C). Thus, a state prisoner has avenues of relief available to prevent an injustice, and the federal courts have no need to resort to the deleterious recall of a mandate. Recalling a mandate in a habeas corpus appeal is *never* necessary.

Despite the devastating effect recalls of mandates in habeas cases have on justice and on the comity between federal and state courts, moving to recall the mandate has become a common technique for capital prisoners seeking successive appellate review in capital habeas cases. *See Greenawalt v. Stewart*, 105 F.3d 1268, 1276 (9th Cir. 1997); *Nevius*, 105 F.3d at 461–62; *Williams v. Calderon*, 83 F.3d 281, 289 (9th Cir. 1996); *Moran v. McDaniel*, 80 F.3d 1261, 1266 (9th Cir. 1996). Although the Ninth Circuit has had, until this case, sufficient respect for the finality of state court convictions and its own review process to deny the motions, such motions will become pervasive in capital habeas appeals throughout the United States if the Ninth Circuit's opinion is allowed to stand. This will allow federal judges to reopen closed cases merely because they disagree with the panel that decided the appeal.

Recalling mandates in habeas cases disparages federal-state comity and finality of judgments that this Court has strived to maintain throughout its habeas corpus jurisprudence. Therefore, Amici States urge that this Court should hold that a federal appeals court may not, under any circumstances, recall its mandate in a habeas corpus case.

CONCLUSION

Amici Curiæ urge this Court to grant the relief Petitioner requests.

Respectfully submitted,

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